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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Robert P. Cottman, et al.,

10 Plaintiffs,

11 v.

12 David G. Naskrent, et al.,

13 Defendants.
14

No. CV-17-02045-PHX-DWL

ORDER

15 Pending before the Court is Plaintiffs’ Motion for Leave to File Late the Revised
16 Consent Form and Opt-In Notice (Doc. 63). For the following reasons, the Court grants
17 the motion.

18 **BACKGROUND**

19 The background facts of this civil action under the Fair Labor Standards Act are
20 described in broad strokes in the Court’s Order conditionally certifying a collective action,
21 pursuant to 29 U.S.C. 216(b), of all delivery drivers employed by Rosati’s Pizza
22 (“Rosati’s”) on or after May 24, 2014. (Doc. 57.) The Court found that Plaintiffs
23 “submitted declarations . . . that aver that Defendants did not pay an hourly salary but
24 instead paid drivers cash per pizza delivered, often resulting in a salary below minimum
25 wage,” that the “policy applied to every delivery driver employed by Rosatti’s,” and that
26 the affidavits submitted by Defendants “do not actually serve to rebut the bulk of Plaintiffs’
27 allegations.” (*Id.* at 5.) The Court further found that Plaintiffs introduced sufficient
28 evidence “to support the allegation that Defendants failed to compensate drivers for

1 overtime hours worked.” (*Id.*) The Court therefore concluded that “there is sufficient
2 evidence in the record to conclude that Plaintiffs and potential opt-in plaintiffs were victims
3 of a single decision, plan, or policy,” such that it was appropriate to certify an FLSA
4 collective action. (*Id.* at 6 (internal quotation marks omitted).) However, the Court
5 determined that the applicable statute of limitations narrowed the group of similarly
6 situated employees proposed by Plaintiffs—who sought a collective action for “all current
7 and former delivery drivers of Defendants who worked at any point from January 1, 2007
8 through the present date” (Doc. 26 at 2; *id.* at Ex. E)—to only those drivers employed by
9 Rosati’s on or after May 24, 2014. (Doc. 57 at 6-7.)

10 The Court noted that Plaintiffs had attached a proposed Notice of Opportunity to
11 Opt-In to Lawsuit (“Notice”) and an Opt-In Consent Form (“Consent”) to their Motion to
12 Certify. (Doc. 57 at 9 (citing Doc. 26 at Ex. E, F).) Although Defendants had not objected
13 to the contents of these forms, the Court ordered Plaintiffs to “submit a revised proposed
14 Notice and Consent form to the Court no later than October 5, 2018” to incorporate the
15 substance of the Court’s Order, adding that “[t]he final Notice to potential plaintiffs and
16 consent to become party plaintiff should be mailed no later than 14 days after the Court
17 issues final authorization of the Proposed Notice.” (*Id.* at 10.)

18 So far, so good. Unfortunately, Plaintiffs failed to submit their revised proposed
19 Notice and Consent by the October 5, 2018 deadline. The parties do not dispute that on
20 October 25, 2018, Plaintiffs’ counsel telephoned Defendants’ counsel to explain that
21 Plaintiffs’ counsel had made some kind of mistake causing the deadline to lapse unheeded
22 and to request a stipulation to file the revised forms, and that Defendants’ counsel refused
23 the request. (Doc. 66 at 2-3.) The following day, on October 26, 2018, Plaintiffs’ counsel
24 filed the Motion presently before the Court, attributing the missed deadline to “a clerical
25 error,” as the deadline had been “inadvertently calendered [sic] as October 25 rather than
26 October 5,” and taking “personal responsibility for the oversight of the deadline.” (Doc.
27 63 at 2.) Defendants filed a Response opposing the Motion on November 9, 2018 (Doc.
28 66), and Plaintiffs filed a Reply on November 16, 2018 (Doc. 67).

DISCUSSION

I. Legal Standard

Rule 6(b)(1)(B) of the Federal Rules of Civil Procedure provides that “[w]hen an act may or must be done within a specified time, the court may, for good cause, extend the time . . . on motion made after the time has expired if the party failed to act because of excusable neglect.” The Supreme Court has explained that “excusable neglect,” in this context, can encompass mistakes and carelessness: “Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party’s control.” *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 388 (1993).¹

Whether the neglect is “excusable” is a flexible standard, “at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission.” *Id.* at 395. At a minimum, courts assessing whether neglect is “excusable” must consider four factors: “[1] the danger of prejudice to the [non-moving party], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.” *Id.* Failure to consider all four factors constitutes an abuse of discretion. *Lemoge v. United States*, 587 F.3d 1188, 1192-93 (9th Cir. 2009). No single factor is determinative. *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1224 (9th Cir. 2000); *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 382 n.2 (9th Cir. 1997).

When assessing whether a failure to act was caused by “excusable neglect,” a court may not impose per se rules. *Pincay v. Andrews*, 389 F.3d 853, 855 (9th Cir. 2004) (“We now hold that per se rules are not consistent with *Pioneer* . . .”). There can be “no rigid

¹ Although *Pioneer* addressed the meaning of the phrase “excusable neglect” as it appears in Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure, the Court specifically noted that Rule 9006(b)(1) “was patterned after” Rule 6(b) of the Federal Rules of Civil Procedure. 507 U.S. at 391. The Ninth Circuit subsequently confirmed that the *Pioneer* test applies in the context of Rule 6(b), as well as Rule 60(b) of the Federal Rules of Civil Procedure and Rule 4(a)(5) of the Federal Rules of Appellate Procedure. *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381–82 (9th Cir. 1997).

1 legal rule against late filings attributable to any particular type of negligence.” *Id.* at 860
2 (affirming that a paralegal’s calendaring error was “excusable negligence.”). Even when
3 the reason for the delay is weak, where the equities favor excusing the negligence, the court
4 must do so. *Bateman*, 231 F.3d at 1224-25 (reason for delay was travel, jet lag, and the
5 time it took to sort through mail).

6 Once a district court has considered and weighed all four *Pioneer* factors, and any
7 other factors it deems appropriate on a case-by-case basis, the court has broad discretion to
8 grant or deny the motion. *Pincay*, 389 F.3d at 859 (“[T]he decision whether to grant or
9 deny an extension of time . . . should be entrusted to the discretion of the district court
10 because the district court is in [the best position] to evaluate factors such as whether the
11 lawyer had otherwise been diligent, the propensity of the other side to capitalize on petty
12 mistakes, the quality of representation of the lawyers . . . , and the likelihood of injustice if
13 the appeal was not allowed.”).

14 **II. Analysis**

15 The Court first considers the danger of prejudice to Defendants. This factor weighs
16 strongly in favor of Plaintiffs because Defendants suffered no prejudice under the
17 circumstances. Plaintiffs originally filed proposed Notice and Consent forms in November
18 2017 (*see* Doc. 26-1) and the Court spelled out, in its September 11, 2018 Order, the narrow
19 revisions that needed to be made before Plaintiffs were to refile them (*see* Doc. 57). Thus,
20 Defendants knew exactly what the revised filings would contain. Defendants cannot claim
21 to have altered their strategy in any way due to the delay. *Lemoge*, 587 F.3d at 1196 (“The
22 [non-movant] does not indicate how it would have changed its strategy . . . , or that a
23 different strategy would have benefitted [it].”). The only prejudice Defendants can claim
24 is the loss of a “quick but unmerited victory, the loss of which [the courts] do not consider
25 prejudicial.” *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1262 (9th Cir. 2010); *see*
26 *also M.D. by and through Doe v. Newport-Mesa Unified Sch. Dist.*, 840 F.3d 640, 643 (9th
27 Cir. 2016) (same).

28 The next *Pioneer* factor is the length of the delay. The length of the delay caused

1 by Plaintiffs was 20 days—14 of which Plaintiffs offered to cure by mailing the Notice and
2 Consent immediately upon receiving authorization from the Court, rather than using the
3 two-week grace period provided by the Court’s September 11, 2018 Order. (Doc. 63 at 3.)
4 Had Defendants stipulated to the late filing, the progress of the action would have been
5 delayed only one week. The ultimate delay of over a month (from October 25 to the date
6 of this Order) was caused by Defendants’ refusal to stipulate to the late filing, which
7 necessitated weeks of briefing followed by a period time for the Court to read the briefs,
8 research the law, and rule on the pending motion. *Newport-Mesa*, 840 F.3d at 643 (“If
9 anything, it was the [non-movant’s] eagerness for a ‘gotcha’ victory that has kept the case
10 from advancing on the merits.”). In any event, regardless of whether the delay is deemed
11 to be a week or a month, it falls within the range of delays that courts have been willing to
12 excuse. *See, e.g., Ahanchian*, 624 F.3d at 1255 (counsel filed three days late, due to a
13 calendaring mistake and computer problems); *Los Altos El Granada Inv’rs v. City of*
14 *Capitola*, 583 F.3d 674, 682–83 (9th Cir. 2009) (delay of “only twelve days” supports a
15 finding of excusable neglect); *Pincay*, 389 F.3d at 855 (counsel filed 24 days late, due to a
16 calendaring mistake caused by a paralegal misapplying a clear legal rule).

17 The third *Pioneer* factor is the reason for the delay. The reason here was a simple
18 clerical error—the Court’s Order set the deadline as October 5, 2018, but a paralegal
19 calendared it as October 25, 2018. The Ninth Circuit has held that calendaring errors can
20 constitute excusable neglect. *Ahanchian*, 624 F.3d at 1255 (district court abused its
21 discretion by denying motion to accept late-filed brief where tardiness was caused by
22 calendaring error); *Pincay*, 389 F.3d at 854–55 (affirming district court decision to accept
23 late filing due to a paralegal’s calendaring error); *Washington v. Ryan*, 833 F.3d 1087, 1099
24 (9th Cir. 2016) (“[W]here other factors counsel relief, a calendaring mistake and related
25 failure to catch that mistake is no bar to . . . relief.”). Certainly, a pattern of missed
26 deadlines caused by calendaring errors would be a greater cause for concern, as would the
27 absence of any reliable calendaring system whatsoever. *Harvest v. Castro*, 531 F.3d 737,
28 747 (9th Cir. 2008) (neglect not excusable where it was “systemic (as evidenced by the fact

1 that it happened more than once)” and where there was no effective system in place). Here,
2 however, there is no pattern of negligence. The Court recognizes that people make
3 mistakes—even the most competent professionals are likely to make a simple clerical error
4 at some point in their careers. The Court finds that the simple calendaring error here does
5 not weigh strongly for or against granting the motion for leave to file late, as it falls
6 somewhere in the middle of the spectrum of least-compelling to most-compelling reasons.
7 *See Newport-Mesa*, 840 F.3d at 643 (“This is not a case where counsel’s neglect is so
8 egregious that it outweighs the remaining three factors.”).

9 The final *Pioneer* factor is whether the movant acted in good faith. The Court
10 cannot conceive of any possible practical advantage Plaintiffs could have hoped to gain in
11 bad faith by missing the deadline to file the revised proposed Notice and Consent. As
12 noted, Plaintiffs first filed these forms over a year ago, in November 2017, and the minor
13 revisions required by the Court’s September 11, 2018 Order were known and understood
14 by Defendants. Moreover, Plaintiffs had nothing to gain by waiting to provide notice to,
15 and solicit the consent of, potential plaintiffs. Not only is there no evidence of bad faith,
16 there is not even any imaginable bad-faith motive here. The calendaring mistake “resulted
17 from negligence and carelessness, not from deviousness or willfulness.” *Lemoge*, 587 F.3d
18 at 1197.

19 In sum, the Court finds that the lack of prejudice to Defendants and the fact that
20 Plaintiffs erred in good faith weigh strongly in favor of granting the motion, and the length
21 of the delay and reason for the delay are either neutral or weigh weakly in favor of granting
22 the motion. No factors weigh against granting the motion. The Court therefore grants the
23 motion.

24 **IT IS THEREFORE ORDERED** that Plaintiffs’ Motion for Leave to File Late the
25 Revised Consent Form and Opt-In Notice (Doc. 63) is **GRANTED**.

26 **IT IS FURTHER ORDERED** that the Court approves the contents of the revised
27 proposed Consent and Notice attached as Exhibits 1 and 2 of Plaintiffs’ Motion, except
28 that the Notice should be amended to reflect that the action is now pending before Judge

1 Dominic W. Lanza and to remove the judicial signature line.² This approval constitutes
2 final authorization of the revised proposed Consent and Notice.

3 **IT IS FURTHER ORDERED** that, notwithstanding that the Court has already
4 approved the revised proposed Consent and Notice, Plaintiffs shall file the revised
5 proposed Consent and Notice by December 4, 2018. (Please make sure to calendar this
6 deadline correctly this time.)

7 **IT IS FURTHER ORDERED** that Plaintiffs shall mail the Consent and Notice to
8 potential plaintiffs by December 4, 2018.

9 Dated this 30th day of November, 2018.

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A handwritten signature in black ink, appearing to read 'DL', is written over a horizontal line.

Dominic W. Lanza
United States District Judge

² See *Woods v. New York Life Ins. Co.*, 686 F.2d 578, 581–82 (7th Cir. 1982) (holding that it is improper for a notice from plaintiffs' counsel to actual or potential plaintiffs to bear a judicial signature or any other judicial imprimatur); Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Collective Actions Under the Fair Labor Standards Act*, 7B Fed. Prac. & Proc. Civ. § 1807 (3d ed.).